

# FAILED FUNCTIONAL CAPACITY EXAMS

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# INTRODUCTION

- Once an employee fails a functional capacity examination or is determined to be unemployable due to a medical condition(s), Management must take a proactive approach in resolving the employability question.
- This session will provide you guidance in dealing with medical-based employability issues.

# OVERVIEW

- How to Administer an Employee Who is Medically Unable to Perform
- American Disabilities Act (ADA) Implications



# DISABLED INDIVIDUAL

- 29 C.F.R. 1614.203(a)(1) defines an individual with a disability as one who:  
(1) has a physical or mental impairment, which substantially limits one or more of a person's major life activities; (2) has a record of such impairment; (3) is regarded as having such an impairment.

# MAJOR LIFE ACTIVITIES

- Major life activities include caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, sitting, standing, lifting, reaching, concentrating, interacting with others, reading, etc.
- References: 42 USC 12102;  
29 CFR 1630.2(i)

# REASONABLE ACCOMMODATION

- An agency is required, in accordance with 29 C.F.R. 1614.203(c)(1), to accommodate known physical or mental limitations of an applicant, or employee, who is a qualified individual with a disability, UNLESS the agency can demonstrate the accommodation would impose an undue hardship on the operation of its program.

# REASONABLE ACCOMMODATION (con't)

- Reasonable accommodation includes job restructuring, part time or modified work schedules, acquiring or modifying equipment or devices, accessibility of facility, readers, interpreters [**EDWARDS v. U.S. POSTAL SERVICE, EEOC No. 01932014 (1994) & 29 C.F.R. 1614.203(c)(2)**]

# UNDUE HARDSHIP

- When a proposed reasonable accommodation would result in an unduly extensive, substantial or disruptive change or a fundamental alternation to the nature of the work. Factors to consider include the overall size of the agency's program with respect to the number of employees, the type and number of facilities, size of the budget, the type of agency operation, composition and structure of the agency's workforce, and the nature and cost of the accommodation.

**[42 USC 12111]**



# HOW WE HANDLE A FAILED FCE

- Once the medical report is received, communicate to the employee's supervisor of the medical findings.
- The supervisor sets up a meeting with the employee and their representative, if appropriate, to discuss the findings.
- The employee is asked to review his Official Personnel Folder to ensure it includes all past work experiences and skills.

# HOW WE HANDLE A FAILED FCE (con't)

- The supervisor and employee review the employee's current position description to identify the essential functions and the impact of the medical findings on the employee's ability to perform these functions.
- If the current position cannot be modified, the supervisor contacts Human Resources to assist in searching for a viable alternative position within the commuting area. Area of search may be expanded if needed.

# HOW WE HANDLE A FAILED FCE (con't)

- Once a position is identified, the essential functions of the position would be reviewed for compliance with medical restrictions and needed accommodations.
- After medical clearance, a formal job offer is generated and employee is given 7 calendar days to consider acceptance.

# HOW WE HANDLE A FAILED FCE (con't)

- If the job offer is declined, the employee is placed in a leave status and removal procedures are instituted.
- If a viable vacant position can not be identified, the employee is placed in a leave status and removal procedures are instituted.

# POINTS TO PONDER

## Documentation & Restrictions

- Agency must prove accommodation efforts if challenged in appeal to EEOC or MSPB
- Document a determination of the essential function(s) of disabled employee's current job
- Document consultation with disabled employee and their representative (if appropriate) to determine precise job-related restrictions and how to overcome those limitations through accommodation [**29 CFR APPENDIX 1630.9 & CLARK v. U.S. POSTAL SERVICE, 74 M.S.P.R. 552 (1997)**]

# POINTS TO PONDER

## Interaction with Employee

- Document that you had the employee review their Official Personnel Folder to ensure completeness of former job experiences, skills, knowledges, etc. [**WESSON v. U.S. POSTAL SERVICE, EEOC No. 019761666 (1999)**]
- Document discussing potential accommodations with the employee and their representative analyzing the effectiveness of each accommodation in enabling the individual to perform the essential functions of the position [**29 CFR APPENDIX 1630.9**]

# POINTS TO PONDER

## Job Availability & Requirements

- Track and document all available jobs within the agency or commuting area. Reassignment may be extended beyond the commuting area. If extended, must consider impact on the agency's administrative and fiscal functions [**Morris v. U.S. Postal Service, No. 99-1051 (4th Circuit 1999)**]
- Document the duties, physical requirements, and qualifications of the vacant positions along with physical limitations of employee [**WESSON v. U.S. POSTAL SERVICE**]

# POINTS TO PONDER

## Employee Job Preferences

- Document that you have considered the job preferences of the employee to be accommodated along with accommodation activities, etc. However, the agency is not required to provide the reasonable accommodation preferred by the employee [**GORE v. DEPART. OF HEALTH AND HUMAN SERVICES, EEOC No. 01931927 (1994) & WHITE v. DEPART. OF VETERANS AFFAIRS, EEOC No. 01931829 (1994)**]



# POINTS TO PONDER

## Declined Job Offers

- If the employee is offered an accommodated position and refuses the offer, the agency does not have to provide another accommodated position and pursue separation of the employee for inability to perform
- Provide the employee with disability retirement options in writing

# POINTS TO PONDER

## Undue Hardship

- The agency must show why reasonable accommodation was not feasible after considering all the factors and alternatives [**Raspanti v. Department of Army, EEOC No. 01942756 (1997)**]
- Holding a position open and vacant for an indefinite period of time is an undue hardship [**STITH v. DEPART OF HOUSING & URBAN DEVELOPMENT, EEOC No. 03880057 (1988)**]

# POINTS TO PONDER

## Undue Hardship

- Agency must be able to defend an undue hardship in not being able to provide reasonable accommodation  
[42 U.S.C. 12111]
- If the employee is placed in a “light-duty” assignment, the burden is on the agency to prove it would be an undue hardship to keep the employee on that assignment. [TAVAROZZI v. U.S. POSTAL SERVICE, EEOC No. 01942481 (1996)]

# POINTS TO PONDER

## Duty to Accommodate

- The Ninth Circuit Court has ruled that an employer's duty to accommodate is a continuing one that is "not exhausted by one effort".  
**[HUMPHREY v. MEMORIAL HOSPITALS ASSOCIATION, 101 FEOR 90034]**
- In the Humphrey decision, the court went on to say that the employer has a duty to accommodate "when the employee asks for a different accommodation or where the employer is aware that the initial accommodation is failing and further accommodation is needed".

# Hot Coffee

